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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 457

MELVILLE ADAMS,

Petitioner,

vs.

DR. WILLIAM A. BOYCE, DR. JOHN BRADY ROGERS, DR. A. RAY IRVINE, DR. RODMAN IRVINE, DR. EDWARD S. BLAINE, DR. H. A. JUDSON, and THE CALIFORNIA HOSPITAL, owned and operated by Lutheran Hospital Society of Southern California,

Respondents.

Brief of Respondents Dr. William A. Boyce, Dr. John Brady Rogers, Dr. A. Ray Irvine and Dr. Rodman Irvine, in Opposition to Petition for Writ of Certiorari.

W. I. GILBERT,
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Parker & Baird Company, Law Printers, Los Angeles.

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DR. WILLIAM A. BOYCE, DR. JOHN BRADY ROGERS, DR. A. RAY IRVINE, DR. RODMAN IRVINE, DR. EDWARD S. BLAINE, DR. H. A. JUDSON, and THE CALIFORNIA HOSPITAL, owned and operated by Lutheran Hospital Society of Southern California,

Respondents.

Brief of Respondents Dr. William A. Boyce, Dr. John Brady Rogers, Dr. A. Ray Irvine and Dr. Rodman Irvine, in Opposition to Petition for Writ of Certiorari.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Respondents Dr. William A. Boyce, Dr. John Brady Rogers, Dr. A. Ray Irvine and Dr. Rodman Irvine respectfully submit this brief in opposition to the petition for a writ of certiorari.

Statement of the Case.

Petitioner brought a malpractice and assault and battery action against several doctors (among whom were these respondents) and a hospital. After petitioner rested his case before a jury, the trial court granted motions for nonsuit in favor of the respondents herein. [R. 698.] The judgment of nonsuit was affirmed by the District Court of Appeal of the State of California, for the Second Appellate District. [R. 1146.] That court likewise denied a petition for a rehearing. A petition for hearing by the Supreme Court of the State of California was also denied. [R. 1147.] The denials of the petitions for rehearing and for hearing by the California Supreme Court were without opinion.

Petitioner presented himself to respondents Dr. William A. Boyce and Dr. John Brady Rogers for the purpose of having removed from his eye a foreign object. Their efforts proved unsuccessful. Subsequently petitioner presented himself to respondents Dr. A. Ray Irvine and Dr. Rodman Irvine who conducted an examination of petitioner's eye.

A malpractice action ensued in which the proceedings hereinbefore referred to were had.

It is difficult to put one's finger on the exact grievance of petitioner. He seems to complain mainly of five facts:

First, that he did not have a fair opportunity to present his case because the trial court arbitrarily ruled that the only way the case could be established was by medical opinion. (Pet'n p. 30.)

Second, that the trial court, in granting a nonsuit, deprived petitioner arbitrarily of the alleged right to have the facts of his case determined by a jury. (Pet'n p. 32.)

Third, that the District Court of Appeal failed to pass on numerous contentions made by petitioner on appeal. (Pet'n pp. 33-34.)

Fourth, that the District Court of Appeal failed to pass upon Federal constitutional questions, the claim being that petitioner was denied equal protection of law and due process of law under the first section of the Fourteenth Amendment of the Constitution of the United States. (Pet'n p. 40.)

Fifth, that the Supreme Court of the State of California erred because it adopted the facts recited on the face of the opinion of the District Court of Appeal, although those facts were challenged by petitioner's petition for rehearing in the District Court of Appeal and by petition for hearing in the Supreme Court. (Pet'n p. 40.)

The actual assignments of error are more numerous. There are thirteen in all. They have been condensed here. We submit that they show immediately, on their face, that the petition does not state a case either within the jurisdiction of this Honorable Court, or in which a writ of certiorari should be granted in the exercise of the Court's discretion.

SUMMARY OR THE ARGUMENT.

Point One.

The record before this Honorable Court does not reveal the existence of a federal question because:

1. There is not drawn in question the validity of a treaty or statute of the United States;

2. There is not drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution, treaties or laws of the United States;

3. There was not specially set up in the state court any title, right, privilege or immunity under the Constitution of the United States;

4. The decision of the state court rests exclusively on non-federal grounds.

Point Two.

The Supreme Court of the United States will not review the decision of a state court for an alleged judicial error of the state court in interpreting the state law.

Point Three.

The alleged errors of the state court, even if they presented a federal question, would not be of sufficient substance to justify the issuance of a writ, because:

1. The state has the right to prescribe the evidence which is to be received in its courts and erroneously admitted evidence does not constitute a denial of due process;

2. The Fourteenth Amendment does not require that civil actions in state courts must be tried to a jury;

3. The refusal to declare a mistrial for the absence of a witness does not violate the due process clause;

4. Judicial errors on the part of appellate courts do not violate the due process clause;

5. The right of appeal is not guaranteed by the due process clause.

ARGUMENT.

I.

The Record Before This Honorable Court Does Not Reveal the Existence of a Federal Question.

The reasons why no federal question is stated are more particularly the following:

(1) Neither the California state courts in which this case was pending drew in question, at any time, "the validity of a treaty or statute of the United States";

28 *U. S. C. A.* 344.

(2) Neither of the state courts in which this case was pending drew in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or law of the United States.

28 *U. S. C. A.* 344.

(3) Neither party to the suit "specially set up" in the state court any "title, right, privilege or immunity * * * under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States."

28 *U. S. C. A.* 344.

(4) The decision of the state court in this case rests entirely and exclusively on non-federal grounds.

Browne v. Union Pacific Ry Co., 267 U. S. 255, 45 S. Ct. 315, 69 L. Ed. 601;

Minneapolis, etc. Ry. Co. v. Washburn Lignite Coal Co., 254 U. S. 370, 41 S. Ct. 140, 65 L. Ed. 310.

Of these four points, only the third will be discussed at length.

II.

The Alleged Federal Right, Privilege or Immunity Under the Constitution Was Not Specially Set Up.

1.

The earliest point at which the alleged federal question could have been raised was in connection with plaintiff's motion for a new trial before the trial court. If a federal question had been properly set out at that time this Honorable Court would have had jurisdiction to grant certiorari. However, the only reference to petitioner's claim is in Point Four of his Points and Authorities in support of the fourth and fifth grounds for a motion for a new trial, and this is in the following language:

> "By taking the case from the jury on the false testimony of Dr. Burr Smith the court denied plaintiff due process of law and a trial by jury." [R. 757.]

These words remotely resemble the language of the Constitution. However, they do not refer specially to the United States Constitution and therefore the privilege, right or immunity is not properly set up.

Endowment & Benevolent Assn. v. Kansas, 120 U. S. 103, 7 S. Ct. 499, 30 L. Ed. 593;

Harding v. Illinois, 196 U. S. 78, 25 S. Ct. 176, 49 L. Ed. 394;

Capital National Bank v. First National Bank, 172 U. S. 425, 19 S. Ct. 202, 43 L. Ed. 502.

2.

The next reference to petitioner's alleged claim of right, privilege and immunity under the Constitution is in petitioner's opening brief in the District Court of Appeal. [R. 914.] We do not have the entire opening brief in the record. It contains no assignment of errors. On the page in question there is a heading as follows:

> "Was Appellant Denied a Fair Trial and Due Process of Law?"

The short text under the heading is to the effect that petitioner was denied a "fair trial" because the trial court "consistently ruled adversely" to him. It is also stated that the "perjury of Dr. Burr Smith and the failure of the trial court to grant appellant a mistrial because of the illegal absence from the state" of a witness under subpoena, denied petitioner "a fair trial and due process of law."

In the light of cases already cited this does not properly raise a federal question.

3.

The next reference is in appellant's reply brief in the District Court of Appeal [R. p. 988] where the heading says "The court denied appellant trial by jury, equal protection of the laws and due process of law by substituting his erroneous theories for actualities." After this heading appears a short quotation from *Heiner v. Donnan,* 285 U. S. 312, which held unconstitutional a state statute attempting to establish the conclusive pre-

sumption that all gifts made within two years of the death of the donor were made in contemplation of death and therefore taxable.

In view of the cases cited this does not properly raise a federal question.

4.

Petitioner's petition for rehearing before the District Court of Appeal has the following reference to petitioner's grievance:

> "We do not believe the law excuses such human weakness in the application of skill and learning; nor do we believe appellant can be denied a trial by jury of the facts of his case on such a silly theory as:
>
> " 'The rule of law is, that the injury shall be described, the treatment given shall be described, and then it shall be either approved or condemned.' [Rep. Tr. p. 392, lines 23-26.] The approving or condemning to be done by another doctor. In other words a trial by expert instead of trial by jury. Appellant never thought he would have to call upon the guarantees of freedom in a case of his own to free him from class enslavement."

This, under the case cited, does not properly raise the federal question.

5.

The petition for hearing by the California Supreme Court cites various sections of the Constitution of the State of California and various sections of the California Code of Civil Procedure. [R. pp. 1095-1096.] It also states that the trial court and District Court of Appeal, by their respective decisions, have denied petitioner the right to prove the facts of his case and have substituted

trial by a medical expert for a trial by jury, and "the District Court of Appeal has dangerously enlarged the authority of physicians to the extent that their patients are enslaved." In this connection petitioner further states that the trial court and the District Court of Appeal thereby "denied appellant due process of law and equal protection of the law as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States." This is the first reference in the voluminous record to the Constitution of the United States.

Denial of the petition for hearing without opinion coupled with the fact that the opinion of the District Court of Appeal makes no reference to these alleged constitutional claims, renders this belated claim of a federal right ineffective.

Jacobi v. Alabama, 187 U. S. 133, 47 L. Ed. 133;

Jett Bros. Distillery Co. v. City of Carrollton, 252 U. S. 1, 40 S. Ct. 255, 64 L. Ed. 421.

6.

The assignment of errors in the petition to this Honorable Court refers to section one of the Fourteenth Amendment of the Constitution of the United States, but this reference cannot cure the defects in the record which no where specially sets up any "title, right, privilege or immunity * * * under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States."

A federal question cannot be raised for the first time in the petition for a writ of error to a state court and in the accompanying assignment of errors.

Montana v. Rice, 204 U. S. 291, 27 S. Ct. 281, 51 L. Ed. 490.

III.

The Supreme Court of the United States Will Not Review the Decision of a State Court for An Alleged Judicial Error of the State Court in Interpreting the State Law.

There is in California, as perhaps in all common law jurisdictions, a rule of law that members of the medical profession are required to exercise that degree of care and skill ordinarily possessed by other members of their profession in good standing, practicing in the same locality.

Johnson v. Clark, 98 Cal. App. 358, 276 Pac. 1052;

Barham v. Widing, 210 Cal. 206, 291 Pac. 173;

Engelking v. Carson, 13 Cal. (2d) 216, 88 Pac. (2d) 695.

A specialist is bound to exercise that degree of care and skill ordinarily possessed by those who devote special study and attention to the particular specialty in the same locality, having due regard to the state of scientific knowledge at the time.

Jensen v. Findley, 17 Cal. App. (2d) 536, 62 Pac. (2d) 430.

In California there are two ways in which it can be established whether or not a given course of conduct by a physician complies with these standards:

1. If the matter in question is one with which laymen are not ordinarily familiar, a physician's conduct is to be

stated hypothetically to a duly qualified medical witness, and he is to be asked his opinion whether the hypothetically stated conduct conforms to the standards just stated. The trier of facts must then choose between conflicting opinions.

Perkins v. Trueblood, 180 Cal. 437, 181 Pac. 642;

Patterson v. Marcus, 203 Cal. 550, 265 Pac. 222.

2. If the matter in dispute is one of common knowledge or one with which the average layman is familiar, the physician's conduct may be stated and the trier of facts may decide without the aid of expert testimony whether the conduct conforms to the standard just stated.

The cases in this latter group are few. To a degree, it is tied up with the doctrine of *res ipsa loquitur,* comprising such situations as these:

A doctor possessing ordinary care and skill will not knock out a patient's tooth in the course of a tonsil operation;

A doctor possessing ordinary care and skill will not inject an unsterilized needle into a patient;

A doctor possessing ordinary care and skill will not apply x-ray treatment in such a manner as to cause burns to a patient.

Whether a case falls into the class where expert opinion is required or into the other class, is a question for the trial judge applying existing laws of evidence.

In the case stated by petitioner, the trial judge was called upon to decide whether the factual situation presented by the evidence of petitioner required the opinion of medical experts or whether it did not. The decision of the trial court, as well as of the California Appellate Courts, was that the factual situation presented by petitioner was one where expert evidence was required.

That decision is unquestionably correct. Were it not correct, then the state courts of the State of California would have made *a judicial error* in interpreting their own rules of law and of evidence. *Such an error would not present a federal question under either the due process clause or the equal protection clause of the* Fourteenth Amendment of the United States Constitution.

Neblett v. Carpenter, 305 U. S. 297; 59 S. Ct. 170; 83 L. Ed. 182;

Worcester County Trust Co. v. Riley, 302 U. S. 292; 58 S. Ct. 185; 82 L. Ed. 268;

Central Land Co. v. Laidley, 149 U. S. 103; 16 S. Ct. 80; 40 L. Ed. 91;

American Railway Express Co. v. Kentucky, 273 U. S. 269; 47 S. Ct. 353; 71 L. Ed. 639.

IV.

The Alleged Errors of the State Courts, Even if They Presented a Federal Question, Would Not Be of Sufficient Substance to Justify the Issuance of a Writ.

If a federal question were properly raised, its scope could be judged by the specifications of error in the petition before this Honorable Court. Without repeating them (Petition, pp. 39-40) they could be summed up in the following propositions:

1. Petitioner is being denied the equal protection of the laws under the Fourteenth Amendment of the United States Constitution because the law of the State of California requires expert medical evidence to establish negligence in malpractice cases;

2. Petitioner was denied a trial by jury contrary to alleged constitutional guarantees (presumably the Fourteenth Amendment of the United States Constitution, this being the only one that petitioner refers to).

3. Petitioner was denied due process of law by reason of the fact that the trial judge failed to declare a mistrial because of the absence from the state of a witness whom petitioner had under subpoena.

4. Petitioner was denied due process of law because the essential facts of petitioner's case were incorrectly stated by the District Court of Appeal.

5. Petitioner was denied due process of law because the Supreme Court of the State of California refuses to go behind the facts recited on the face of the opinion of a District Court of Appeal.

1.

The rule to which petitioner objects is firmly established in the jurisprudence of all common law jurisdictions. The experience of centuries, during which this rule has developed, is a certain guarantee that is not utterly unreasonable or unfair. The state has the right and power to prescribe the evidence which is to be received in the courts of its government.

Hawes v. Georgia, 258 U. S. 1; 42 S. Ct. 204; 66 L. Ed. 431;

Mobile etc. Co. v. Turnipseed, 219 U. S. 35; 31 S. Ct. 136; 55 L. Ed. 78.

Error of a trial judge in admitting evidence or entering a judgment after a proper hearing does not constitute a denial of due process of law.

Jones v. Buffalo Creek Etc. Co., 245 U. S. 328; 35 S. Ct. 121; 62 L. Ed. 325.

2.

The Fourteenth Amendment does not require that civil actions in state courts must be tried to a jury, nor does it guarantee any particular form or method of state procedure.

Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U. S. 151; 52 S. Ct. 69; 76 L. Ed. 214;

New York Central R. R. Co. v. White, 243 U. S. 188; 37 S. Ct. 247; 61 L. Ed. 667;

Wagner Elec. Mfg. Co. v. Lyndon, 262 U. S. 226; 42 S. Ct. 589; 67 L. Ed. 961.

The power of a court to grant a nonsuit is not an infringement of the right of trial by jury.

Coughran v. Bigelow, 164 U. S. 301; 17 S. Ct. 117; 41 L. Ed. 442.

3.

Under the rule already cited that an erroneous decision of the state court does not constitute a violation of the due process clause the claim that due process required that a mistrial be declared lacks all substance. Except for the quotation from appellant's opening brief [R. pp. 914-915] there is no other reference or assignment of error in the record concerning this matter. Therefore, even if the claim had merit the record before this Honorable Court would be insufficient to consider it.

4.

The claim that due process requires that appellate courts state the facts "correctly" (that is, as the petitioner conceives them to be), will not be discussed further. It falls within the authorities already referred to that an erroneous decision or determination of a state court is not a deprivation of due process of law.

5.

It is well established that the guarantee of due process of law does not require a state to provide any appellate machinery whatever for the review of cases. *An appellate review is entirely a matter of grace.*

District of Columbia v. Clawans, 300 U. S. 617; 57 S. Ct. 660; 81 L. Ed. 843;

Ohio v. Akron Metropolitan Park District, 281 U. S. 74; 50 S. Ct. 228; 74 L. Ed. 710.

Since the California Supreme Court limits its review to the factual situation presented to it by the District Court of Appeal (*Koberle v. Hotchkiss,* 8 Cal. App. (2d) 634; *Rockridge Place Co. v. City Council,* 178 Cal. 58), no federal right of petitioner has been infringed.

Conclusion.

Petitioner has not stated a case which involves a substantial federal question for decision. No federal question at all is properly raised, since no privilege, right or immunity under the United States Constitution has been denied petitioner.

Therefore, it is respectfully submitted that petitioner's petition for a writ of certiorari sets forth nothing upon which such a writ could be issued, and should be denied.

Respectfully submitted,

W. I. GILBERT,

Attorney for Respondents Dr. William A. Boyce, Dr. John Brady Rogers, Dr. A. Ray Irvine, and Dr. Rodman Irvine.

Due service of the within Brief is hereby acknowledged this.....day of October, A. D. 1940.

_____

_____

Attorneys for Petitioner.

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Respondents.

BRIEF OF RESPONDENT LUTHERAN HOSPITAL SOCIETY OF SOUTHERN CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT LUTHERAN HOSPITAL SOCIETY OF SOUTHERN CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Opening Statement.

As counsel for the respondent Lutheran Hospital Society of Southern California, we believe a more concise

statement of the pertinent facts relative to such respondent can be set forth than the statements appearing in the petition and brief in support thereof.

It appears from the record that this respondent operates a hospital in the city of Los Angeles [R. p. 768] and that petitioner became a patient in said hospital on November 29, 1935, for the purpose of having a foreign body removed from his eye [R. p. 768], said operation being performed by the respondents Boyce and Rogers. [R. pp. 3, 93.] The doctors were not successful in removing the foreign object at the time of the operation. Dr. Boyce, who had been engaged by petitioner, had secured the assistance of Dr. Rogers in the operation. [R. p. 93.]

There is no evidence in the record tending to establish any relationship between the doctors, the individual respondents, and the respondent Lutheran Hospital Society of Southern California, nor is there any evidence in the record tending to disclose that the doctors failed to exercise the requisite degree of skill and care required of them during the operation or in the treatment of the patient, either prior or subsequent thereto, and at the conclusion of plaintiff's evidence the trial court granted motions for nonsuit as to all defendants.

ARGUMENT.

I.

If the Questions Presented by Petitioner Are Open to Review, Even a Casual Examination of the Record Establishes That the Grounds Assigned by Petitioner for the Granting of the Writ of Certiorari Herein Are Without Merit.

If we correctly understand petitioner's brief filed in support of the petition for writ of certiorari, he suggests that the writ prayed for herein be granted on the ground that the action of the trial court in ordering judgments of nonsuit pursuant to the motions made by the respective defendants deprived petitioner of his right to a trial by jury in violation of section 7, article I of the Constitution of the State of California, which provides that:

> "The right of trial by jury shall be secured to all and remain inviolate."

Subdivision 5 of section 581 of the Code of Civil Procedure of the state of California (Sts. 1923, p. 1869) provides that a judgment of nonsuit may be entered in an action:

> "By the court, upon motion of the defendant when upon the trial plaintiff fails to prove a sufficient case."
>
> Subd. 5, Sec. 581, C. C. P. (Sts. 1923, p. 1869).

The granting of such a motion is not an infringement of the constitutional right of trial by jury.

It is stated by this Honorable Court in *Coughran et al. v. Bigelow et al.*, 164 U. S. 301, 308, 41 L. Ed. 442, 446:

> "That the cases above cited, which held that the circuit court of the United States had no authority to order peremptory nonsuits, were based, not upon a constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this court, is shown by the recent case of *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 38 (30:55, 61), where it was held that, since the act of Congress of June 1, 1872 (17 Stat. at L. 197), re-enacted in §914 of the Revised Statutes, courts of the United States are required to conform as near as may be, in questions of 'practice, pleadings, and forms and modes of proceeding,' to those existing in the courts of the state within which the trial is had, and a judgment of the circuit court of the United States for the eastern district of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld. *It is the clear implication of this case that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury.*" (Italics ours.)

Coughran et al. v. Bigelow et al., 41 L. Ed. 442, 446.

Similar decisions have been rendered by the Supreme Court of California and the District Court of Appeal.

See:

Estate of Baird, 198 Cal. 490, 506, 246 Pac. 324, 331;

Bohn v. Pac. Elec. Ry. Co., 5 Cal. App. 622, 626, 91 Pac. 115, 117.

See, also:

F. C. Ayres Mercantile Co. v. Union Pac. R. Co., 16 Fed. (2d) 395, 397 (C. C. A. 8th 1926);

Italian Star Line v. U. S. Shipping Board Emergency Fleet Corp., 53 Fed. (2d) 359, 360 (C. C. A. (2d) 1931).

It is therefore apparent that the only question remaining for determination, if reviewable by this Honorable Court, is whether the trial court erred in granting the motion for nonsuit.

II.

This Respondent Could Only Be Liable on the Theory of Respondeat Superior and Negligence of the Respondent Doctors Could Only Be Established by Expert Testimony, and in the Absence of Such Evidence the Court Properly Granted the Motions for Judgments of Nonsuit.

Of course, the substance of the allegations of the various causes of action in so far as they affect this respondent is that the hospital undertook to practice medicine. There is no evidence to support such allegations and it is to be presumed that it did not do so.

See:

Pilger v. City of Paris, etc., 86 Cal. App. 277, 281, 261 Pac. 328, 329;

Pac. Employers Ins. Co. v. Carpenter, 10 Cal. App. (2d) 592, 595, 52 Pac. (2d) 992, 994.

It is obvious that the respondent hospital would not be liable for the negligence, if any, of the attending physicians in the absence of evidence tending to show the relationship of master and servant between it and the doctors in attendance upon petitioner. Petitioner does not claim that the doctors, other than Boyce, were in any wise connected with the hospital. The record conclusively establishes that the services of respondent Boyce was procured by petitioner and that he was not acting as the employe of the hospital. [R. p. 493.]

Aside from the total lack of evidence tending to establish circumstances which would warrant the application of the doctrine of *respondeat superior,* there is not a scintilla of evidence having the slightest tendency to prove negligence upon the part of the individual respondents.

The Supreme Court of California and the various District Courts of Appeal in a long and unbroken line of decisions have held that in actions of this character negligence can only be established by the testimony of expert witnesses.

In *Perkins v. Trueblood,* 180 Cal. 437, 442, 181 Pac. 642, 644, it is said:

> "There was no testimony of any expert witness who said that anything covered by this treatment was improper, or that there was anything lacking in the treatment which would have been included by a reasonably prudent and skillful surgeon.
>
> "In *McGraw v. Kerr,* 23 Colo. App. 163, (128 Pac. 873), it is said: 'Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done.' Quoting further from the same case: 'The authorities are practically uniform in holding, . . . that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony.' (See, also, *Houghton v. Dickson,* 29 Cal. App. 321, (155 Pac. 128); *Hesler v. California Hospital Co.,* 178 Cal. 764, (174 Pac. 654).)

"The evidence wholly fails to show any lack of care and skill on the part of defendant in setting and treating the fractured bond of plaintiff's leg."

Perkins v. Trueblood, 180 Cal. 437, 442-3, 181 Pac. 642, 644.

See:

Patterson v. Marcus, 203 Cal. 550, 553, 265 Pac. 222, 223;

Scherer v. Eidenmuller, 45 Cal. App. 372, 374, 187 Pac. 445;

Ingamells v. Goodfellow, 109 Cal. App. 62, 66, 292 Pac. 162, 164;

Markart v. Zeimer, 67 Cal. App. 363, 368, 227 Pac. 683, 684;

Donahoo v. Lovas, 105 Cal. App. 705, 709, 288 Pac. 698, 700;

Nicholas v. Jacobson, 113 Cal. App. 382, 386, 298 Pac. 505, 507.

In this case not only is there no expert testimony tending to establish negligence upon the part of the doctors, but the record discloses [R. pp. 584-587] that the only qualified expert called as a witness upon behalf of the plaintiff in answer to a hypothetical question put to him on direct examination, which embraced all of the salient facts concerning the treatment rendered by Dr. Boyce and which called for his opinion as to whether the treatment described in the question was consistent with the requisite degree of skill and care required of specialists under similar circumstances, gave as his opinion *that the doctor described in the hypothetical question exercised such skill and care.*

Conclusion.

There being no evidence whatsoever of any negligence upon the part of the doctors in their treatment of the plaintiff, the motions for nonsuit were correctly granted. The granting of these motions did not infringe or impair any constitutional right of the petitioner.

It is therefore respectfully submitted that no error of law or miscarriage of justice has occurred and that there is no need for the exercise of the supervisory powers of this Honorable Court.

All of which is respectfully submitted.

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PHILIP C. STERRY,
Of Counsel.

Due service of the within Brief is hereby acknowledged this.....day of October, A. D. 1940.

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Attorneys for Petitioner.

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